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EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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April 26, 2007

In the Matter of

William Churchill

DALA Docket No. DEP-05-1227
DEP Docket No. 2005-194
DEP File No. 301-0866
Sudbury

Final Decision

I adopt the Recommended Final Decision of the Administrative Magistrate that a final wetlands permit should be issued for this project and provide a brief additional statement of reasons which modifies a prior summary decision. This case involved the construction of a single family house, driveway, and septic system in Sudbury. The 1.43 acre lot borders the Sudbury River and contains riverfront area. The Natural Heritage and Endangered Species Program evaluated the site and found that the project could go forward. The Petitioner, an abutter, appealed the Department's superseding order approving the project on the grounds that a no-build alternative was not considered in spite of her offer to buy the property and the septic system would harm wetland resources.

First, the applicant was not required to consider a no build alternative based on the abutter's willingness to purchase the property. Because the lot was recorded before

August 7, 1996¹ and its shape and size prevent compliance with the otherwise applicable performance standards, the Department must allow the construction of a single family house, provided it meets the standards to the maximum extent practicable and other legal requirements. See 310 CMR 10.58(4)(d)3. The applicant has provided an undisturbed vegetated corridor of more than 100 feet adjacent to the river and has sited the house and septic system as far from the river as possible. Nothing in the regulations suggests that an applicant in these circumstances should forgo the project entirely. On the contrary, the applicant has done all that is required.

Secondly, I address the applicability of the presumption for septic systems constructed in compliance with Title 5, “*or more stringent local board of health requirements.*” 310 CMR 10.03(3)(emphasis added). The conjunction “or” signifies that if there are any local requirements more stringent than Title 5, the applicant must conform to them rather than simply complying with the state standards. The presumption is effective only if the components of the system meet setbacks from wetland resource areas, and verifying these setbacks is the primary function of the issuing authority in a wetlands permit review. The presumption plays an important role in the regulations by coordinating and distinguishing between the exercise of authority under the Wetlands Protection Act and Title 5, thereby avoiding unnecessary review.²

The Department relies on the issuance of a permit by the local board of health, unless it determines further inquiry is appropriate. See Wetlands Program Policy No. 86-1, Issued July 11, 1986, Revised March 1, 1995. The Policy states that the Department will not review decisionmaking by a local board of health under its local bylaw or

¹ The Rivers Protection Act was signed into law on August 7, 1996.

² The presumption and a related Department Policy are also important because an applicant may or have not have a septic system permit prior to filing a notice of intent.

regulations, including the granting of variances. A system is entitled to the presumption where three criteria apply. First, the Department determines that the Title 5 requirements have been met, and may generally rely on the issuance of a disposal system construction permit by the board of health. Second, a variance has not reduced the setback below the requirements at 310 CMR 10.03(3); the issuance of a local permit indicates that notwithstanding the variance, the local authority has determined that its more stringent requirements have been met. Third, the Department has not been provided with overwhelming evidence that the board of health has failed to properly review the case.

In this case, the Sudbury Board of Health issued a permit that met the requirements of Title 5, granted variances that still met the requisite setbacks from resource areas, and there was no evidence of any deficiency in the local review. The soil absorption system was located more than 100 feet from mean annual high water as specified to protect wildlife habitat in the riverfront area. 310 CMR 10.03(3). The system in this case was therefore entitled to the presumption. While the presumption applies to the impacts from the discharge, not from construction, the Petitioner here was not contesting construction impacts but instead alleged adverse effects on the river from the system itself.

Although the presumption may be overcome, a party challenging the siting of a septic system that has received a local board of health permit must provide evidence of some deficiency in that review so that the interests of the Act will not be protected. Where such evidence was not proffered to form the basis for a factual dispute, the applicant could have relied on the presumption to support a motion for summary decision. The Department cannot and should not review the impact of discharges from

septic systems that have properly obtained local permits that meet the required setbacks from wetland resource areas and are otherwise entitled to the presumption as specified in the regulations.

The parties to this proceeding are notified of their right to file a motion for reconsideration of this Decision, pursuant to 310 CMR 1.01 (14)(d). The motion must be filed with the Docket Clerk and served on all parties within seven business days of the postmark date of this Decision. A person who has the right to seek judicial review may appeal this Decision to the Superior Court pursuant to M.G.L. c. 30A, §14(1). The complaint must be filed in the Court within thirty days of receipt of this Decision.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Arleen O'Donnell
Acting Commissioner